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Supreme Court, U.S.
FILED
MAR 4 - 2005
OFFICE OF THE CLERK

No. 04-711

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

ALFRED J. KOONIN,
Petitioner,

–against–

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This reply is respectfully submitted to the government's opposition to the petition for certiorari. Points I and II address the government's opposition; as noted below, the government does not oppose petitioner's request to have his sentence vacated and remanded for further consideration in light of this Court's decision in United States v. Booker, 125 S.Ct. 738 (2005).

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER HOW PROPERLY TO COUNT THE TIME THAT COMPRISES THE STATUTE OF LIMITATIONS SET FORTH AT 18 U.S.C. § 3282(a)

The government's opposition to this petition for certiorari underscores serious confusion among the circuit courts about when an indictment charging conspiracy must be brought in order to be timely. The government does not dispute that the courts are frequently called upon to address the issue, and that there is considerable disarray in their holdings. Nor does the government dispute that – correctly or not – court after court, for the last forty years, has relied on this Court's decision in Grunewald v. United States, 353 U.S. 391 (1957) as setting the standard of analysis for such statute of limitations determinations. Finally, the government does not dispute that, for those defendants whose cases are subject to this analysis, a significant liberty interest is usually at stake, or that the confusion within and among the lower courts has caused tremendous disparities in treatment of similarly-situated defendants. The instant case is an excellent vehicle for resolving and clarifying these questions.

It is clear that lower courts have relied on Grunewald as black-letter law governing the statute of limitations in conspiracy cases. As set forth in Koonin's petition, the First, Sixth and

Tenth Circuits – and, in part, the Second and Fifth Circuits – have relied on Grunewald as setting forth the standard for analyzing how a statute of limitations is to be calculated in a case with a conspiracy charge. As the government's opposition confirms, other circuit courts have declined to apply Grunewald, instead utilizing a different analysis to reach a conclusion that is completely at odds with the clear language of Grunewald. In those criminal conspiracy cases, the courts evaluate the permissible indictment filing dates by relying, as precedent, on *civil* filing rules.[1]

However, the mere fact that courts have repeatedly relied on that quicksand logic – extended to a criminal case once in 1933 by the Ninth Circuit without analysis, and thereafter adopted by other courts – does not validate that deeply flawed analysis. It is particularly inappropriate to engraft a "general rule" enunciated in the specific context of civil filing procedures onto time limits for prosecuting criminal cases since those civil rules serve an utterly different function than the criminal statute of limitations. It is "most unfair and dishonest. . . for the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance." Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.) (L. Hand, J.), cert. denied, 277 U.S. 590 (1928).

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[1] As the government recognizes (Opp. at 8), the "general rule" upon which those cases rely stems from a discussion of the tardiness of civil tax assessments imposed under the Revenue Acts of 1918 and 1921. Burnet v. Willingham Loan & Trust Co., 282 U.S. 437 (1931). In reversing the lower court's finding that the assessments were too late, the Burnet Court recognized that the case called for "no special reason for being more precise" and used its own assessment of how "people generally measure periods of [time]." Id. at 438-39.

The government's opposition further highlights the need for clarification by this Court when it raises the significant sub-question as to how the statute of limitations is to be computed if the conspiracy offense charged does not require proof of an overt act. (See Opp. at 11, n.3) While, in our view, that is not an issue here, as this Court recognized when it granted certiorari and decided Whitfield v. United States, 125 S.Ct. 687 (January 11, 2005), the lower courts have not agreed about when an overt act is required in specific federal conspiracy statutes. That additional factor has simply added another layer of confusion to the question presented here as to how to calculate the statute of limitations in conspiracy cases. Because the statute of limitations question in that context is likely to blossom into multiple and conflicting lines of cases, just as the overt-act conspiracy case law has developed, this Court should grant certiorari now to resolve this important question.

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHEN A CONSPIRACY CONTINUES FOR STATUTE OF LIMITATIONS PURPOSES, AFTER ITS PURPOSE HAS BEEN DEFEATED

Petitioner raised a second claim: that this Court should clarify whether a conspiracy can continue, for statute of limitations purposes, after its purpose has been defeated. Specifically, he contended that the Ninth Circuit improperly expanded the holding of United States v. Jimenez Recio, 537 U.S. 270 (2003), by suggesting that a telephone call between co-conspirators could extend the statute of limitations even though the call did not further the conspiratorial agreement.

The government opposes this claim only to the extent that it raises a factual question; that is, it concedes that the Ninth Circuit did not find that the conspiracy was continued by the telephone call between petitioner and Abel on February 28th, but

rather concluded that the last overt act occurred with the attempted shooting on February 23rd. Accordingly, the government asserts, there is no holding to review. (Opp. at 16)

Therefore, assuming that the government is correct and the Ninth Circuit's suggestion is pure dictum, then petitioner's first issue is more clearly presented and, since it is unencumbered by any extraneous facts or conclusions, presents an excellent vehicle for addressing that important statute of limitations question. If the Ninth Circuit is incorrect, and this second issue is presented, then it is itself worthy of a grant of certiorari.

III. PETITIONER SEEKS VACATION OF HIS SENTENCE AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF UNITED STATES v. BOOKER

Finally, the government does not oppose petitioner's request to have his sentence vacated and remanded for further consideration in light of this Court's decision in United States v. Booker, 125 S.Ct. 738 (2005). As the government noted, in view of this Court's holding that the federal Sentencing Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness, we respectfully submit that petitioner's sentence be vacated and remanded for further consideration.

CONCLUSION

This Petition raises two important constitutional issues about which the law is in conflict. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 3, 2005